IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
JEFF J. RODRIGUEZ,	§	CASE NO. 98-37396-SAF-7
DEBTOR.	§	
	§	
AMERICAN CHIROPRACTIC CLINIC-NORTH DALLAS, P.C., HARRY L. CURE, TRUSTEE OF THE PAUL E. LIECHTY LIQUIDATING TRUST, and THE SHARP FAMILY TRUST,	§	
PLAINTIFFS,	§	
	§	
VS.	§	ADVERSARY NO. 00-3040
	§	
JEFF J. RODRIGUEZ,	§	
DEFENDANT and THIRD PARTY PLAINTIFF,	§	
	§	
VS.	§	
	§	
FERRER, POIROT & WANSBROUGH,	§	
THIRD PARTY DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

American Chiropractic Clinic-North Dallas, P.C., Harry Cure as trustee of the Paul E. Liechty Liquidating Trust, and the Sharp Family Trust, plaintiffs, contend in this adversary proceeding that a debt of $184,645 has not been discharged in the bankruptcy case of Jeff J. Rodriguez. Rodriguez responds that he

owes no debt to the plaintiffs. Alternatively, Rodriguez contends that if he does owe a debt, then the debt has been discharged. In the event that the plaintiffs prevail, Rodriguez asserts a third party claim against his bankruptcy lawyers, Ferrer, Poirot & Wansbrough. The court conducted a trial of the adversary proceeding on February 19, 2002.

The discharge of a debt raises a core matter over which this court has jurisdiction to enter a final judgment. 28 U.S.C. §§157(b)(2)(I) and 1334 (2001). This memorandum opinion contains the court's findings of fact and conclusions of law. Bankruptcy Rule 7052.

A discharge under 11 U.S.C. §727 discharges all prepetition debts, regardless of whether a proof of claim has been filed, unless that debt is specifically excluded from discharge under 11 U.S.C. §523. Section §523(a)(3) provides exclusions for unlisted and unscheduled debts. The plaintiffs contend that the debt is not discharged under either 11 U.S.C. §523(a)(3)(A) or (B). Section 523(a)(3) provides that a discharge under 11 U.S.C. §727 does not discharge an individual debtor from any debt:

> neither listed nor scheduled under section 521(1) of [the Bankruptcy Code], with the name, if known to the debtor, of the creditor to whom such debt is owed in time to permit –
>
> (A) if such debt is not of a kind specified in paragraph (2), (4) or (6) of this subsection, timely filing of a proof of claim, unless such creditor had

> notice or actual knowledge of the case in time for such timely filing; or (B) if such debt is of a kind specified in paragraph (2), (4) or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request.

A Debt

The plaintiffs must first establish that Rodriguez owes a debt to one of them. Rodriguez purchased the assets of American Chiropractic Clinics-North Dallas, P.C., ("ACC") in 1995. Liechty was the sole shareholder of ACC. Rodriguez executed a promissory note, dated June 1, 1995, for $200,000, payable to ACC. To secure the note, Rodriguez pledged to ACC accounts, equipment, furniture and fixtures, located at 9991 Marsh Lane, Dallas, Texas, as collateral, by security agreement dated June 1, 1995.

ACC leased the premises at 9991 Marsh Lane from ACH Partnership. As part of the transaction, ACC agreed to sublet the premises to Rodriguez. ACC also agreed to obtain the written consent of ACH Partnership for the sublease.

ACC failed to obtain the written consent of ACH. ACH consisted of three partners, Arenson, Clavin, and Hoffman. Liechty discussed the sublease with Arenson. Liechty provided a written consent form for Arenson to execute. However, Arenson

did not execute the consent form. In fact, Arenson died without giving written consent for the sublease. Liechty did not approach either of the other two partners for consent.

Nevertheless, Rodriguez took possession of the premises at 9991 Marsh Lane in June 1995. Either Rodriguez or a professional business association that he formed timely paid the rent on the premises directly to ACH, which accepted all payments tendered. Rodriguez paid the rent through April 1997. In addition, Rodriguez timely tendered his note payments to ACC by checks made payable to Liechty. Liechty accepted all of the note payments that Rodriguez tendered. Rodriguez made note payments through April 1997.

By a letter dated April 1, 1997, Rodriguez advised ACH that because written approval of the sublease had never been obtained, he would vacate the premises on May 1, 1997. Rodriguez provided a copy of that notice to Liechty. Rodriguez vacated the premises on May 1, 1997.

Rodriguez contends that ACH locked him out of the premises. He contends that ACH took that action because of its desire to have a dentist lease the premises. Hoffman of ACH had previously taken Rodriguez's office space for use by a pharmacy. Rodriguez neither protested nor contested that action. Hoffman testified that he did have an interest in placing a dentist in the space;

but, that he also had an interest in having the rent paid. ACH did not provide a notice to vacate to either Rodriguez or ACC. In fact, ACH took no legal action to terminate the lease or evict Rodriguez.

Rodriguez left the ACC collateral at the premises. Although he had received notice that Rodriguez would vacate the premises, Liechty took no action to obtain possession of the collateral.

Rodriguez filed his petition for relief under Chapter 7 of the Bankruptcy Code on August 27, 1998.

Rodriguez owes $184,645 plus interest from May 1, 1997, to ACC on the note.

Rodriguez contends that he should be relieved of liability on the note for failure of consideration, namely, the failure of ACC to obtain ACH's written consent to the sublease. Rodriguez waived any objection to the lack of written consent. "Waiver has been defined as an intentional relinquishment of a known right or intentional conduct inconsistent with claiming it." United States Fidelity & Guaranty Co. v. Bimco Iron & Metal Corp., 464 S.W.2d 353, 357 (Tex. 1971) (citing Mass. Bonding & Insurance Co. v. Orkin Extermination Co., 416 S.W.2d 396 (Tex. 1967)). A party may waive a condition precedent. Sun Exploration and Production Co. v. Benton, 728 S.W.2d 35, 37 (Tex. 1987). The performance of a condition precedent "can be waived or modified by the party to

whom the obligation was due by word or by deed." Ames v. Great Southern Bank, 672 S.W.2d 447, 449 (Tex. 1984). In this case, Rodriguez took possession of the premises in June 1995 knowing that ACC had not obtained the written consent of ACH. Rodriguez understood from Liechty that consent would be forthcoming. But, Rodriguez knew that when he took possession, ACC had not obtained consent.

Furthermore, without ever receiving a notice that ACH had given its written consent, Rodriguez remained on the premises until May 1, 1997. Until tendering notice, either Rodriguez or his business association paid the base rent to ACH, which accepted payments. While Hoffman took control over Rodriguez's office space, Rodriguez continued to possess and use the remainder of the space, while still paying rent to ACH. While Hoffman had taken actions suggesting that he wanted the remainder of the premises for other uses, ACH took no formal action to either obtain possession or contest Rodriguez's use of the premises.

During this entire period, Rodriguez timely tendered his note payments.

Accordingly, the court finds that, by his conduct, Rodriguez effectively waived ACC's failure to obtain ACH's written consent to the sublease. See Sun Exploration, 728 S.W.2d

at 35; Ames, 672 S.W.2d at 449.

ACC owns the note, and has the right to payment. Liechty filed a bankruptcy case under Chapter 11. Consequently, Liechty's stock in ACC became property of his bankruptcy estate. Harry Cure is the liquidating trustee of Liechty's bankruptcy estate. Cure has taken no action as holder of the ACC stock to remove Liechty as the sole officer and director of ACC. Liechty thereby exercises corporate governance powers over ACC.

The court, therefore, finds that, on the petition date, Rodriguez owed ACC $184,645 plus interest of 8% per annum from May 1, 1997.

Section 523(a)(3)

Since the plaintiffs have established a debt owed to ACC, the plaintiffs next contend that the debt has not been discharged under §523(a)(3). The plaintiffs argue that ACC did not receive timely notice of the bankruptcy case; that, as a result, it suffered prejudice and could not meaningfully participate in the administration of the bankruptcy case.

Section 523(a)(3) applies to a debt "neither listed nor scheduled" under §521(1) of the Bankruptcy Code. Under 11 U.S.C. §521(1), the debtor must file a list of creditors and a schedule of assets and liabilities. The list of creditors or the schedule should be filed with the bankruptcy petition. Bankruptcy Rule

1007(a) and (c). If the debtor files the list of creditors with the petition, then the debtor may file the schedules within 15 days from the date of filing the petition. Bankruptcy Rule 1007(c).

On the petition date, August 27, 1998, Rodriguez filed a list of creditors, called a creditor matrix, which listed only the Internal Revenue Service as a creditor. Rodriguez signed a form reporting that the list was "complete, true and accurate."

On September 14, 1998, Rodriguez filed an amended creditor matrix adding 39 creditors, including Paul E. Liechty. On September 14, 1998, Rodriguez filed his schedule of liabilities, listing Paul E. Liechty, at 3334 Town East Blvd. #102, Mesquite, TX 75150. Liechty was designated as holding a disputed unsecured claim of $200,000.

Liechty does not hold a claim against Rodriguez. ACC holds the claim. Rodriguez neither listed ACC on the creditor matrix, as amended, nor did Rodriguez schedule ACC on his schedule of liabilities. But, Liechty served ACC as its sole officer and director. Also, until he filed his personal bankruptcy case, Liechty was ACC's sole shareholder. Rodriguez made all note payments by check sent to Liechty at the scheduled address. The scheduled address was the designated registered office of ACC. Liechty accepted payments for ACC sent to that address. In fact,

Liechty acted as the registered agent of ACC. After Liechty's personal bankruptcy case, he continued to serve as the sole officer and director of ACC. For these reasons, listing and scheduling Liechty rather than ACC effectively lists and schedules ACC. Had Liechty received notice of the bankruptcy case, he would have understood that Rodriguez effectively referenced the debt on the note to ACC.

Similarly, Rodriguez classified the debt as unsecured even though he had executed a security agreement. Section 523(a)(3) requires the debt to be listed or scheduled under §521(1). Rodriguez effectively scheduled the debt, but mis-classified it. Had Liechty received notice of the bankruptcy case, he could have taken actions to correct the classification.

But, ACC contends that it nevertheless failed to receive notice of the bankruptcy case until February 6, 1999, following the entry of Rodriguez's discharge on February 1, 1999.

Rodriguez timely filed a creditor matrix with the petition. But, the matrix was incomplete, listing only one of forty creditors. Rodriguez corrected the matrix and filed his schedules on September 14, 1998, since the fifteenth day after the petition date fell on Sunday, September 13, 1998. The clerk of court used the creditor matrix filed with the petition to serve notice of the bankruptcy case, including the date for the

meeting of creditors, and the deadlines for filing complaints objecting to discharge or the dischargeability of a debt. Obviously, ACC did not receive that notice. When Rodriguez filed the amended matrix and the schedule of liabilities, his attorney did not serve notice of the filing on the added creditors, including Liechty.

The failure to have included either ACC or Liechty on the original creditor matrix meant that Rodriguez did not file a complete list of creditors with his petition as required by Bankruptcy Rule 1007(a). That omission resulted in a lack of notice of the case given to either Liechty or ACC. Rodriguez filed his amended matrix and his schedule of liabilities within fifteen days after the petition date. But, he failed to remedy the notice deficiency by serving notice of the filing on the added creditors. Thus, the incomplete original matrix resulted in an effective failure to list ACC since the omission resulted in a lack of notice. Rodriguez could have timely cured the notice omission, but his attorney failed to do so.

In Robinson v. Mann, 339 F.2d 547 (5th Cir. 1964), the Fifth Circuit enumerated three factors that courts must weigh when determining whether a debtor's failure to list a creditor will prevent a discharge of the unscheduled debt. Courts must examine: (1) the circumstances surrounding the debtor's failure

to list the creditor; (2) the amount of administrative disruption that would likely occur due to that failure; and (3) any prejudice suffered by the listed and unlisted creditors in question. Id. at 550.

The first factor focuses on the debtor's reasons for failing to schedule the debt. If the debtor's failure to schedule the debt is due to intentional design, fraud, or improper motive, then the court should not discharge the debt under §523(a)(3). However, if the debtor's failure to schedule the debt is attributable to either negligence or inadvertence, then equity favors discharge. In this case, Rodriguez scheduled the debt but ACC did not receive notice until after the debtor's discharge. ACC alleges that this omission was more than mere negligence or inadvertence. The court finds that ACC did not receive timely notice. However, the court does not find that this failure was due to intentional design, fraud, or improper motive. Although the creditor matrix that Rodriguez submitted with his bankruptcy petition did not list all of his creditors, Rodriguez's amended matrix and schedule of liabilities did contain that information. Rodriguez's attorney should have served notice of the filing to the creditors that were listed on the amended matrix and the schedule of liabilities. The attorney negligently failed to cure the notice deficiency. Therefore, the court finds that

Rodriguez's failure to notify ACC was due to his attorney's mistake or negligence. Rodriguez included the debt in the amended matrix and schedule of liabilities and filed them to timely allow notice to Liechty or ACC. But, his lawyer failed to send notice to either Liechty or ACC. This evidence does not support a finding of intentional or reckless failure by the debtor as argued by the plaintiffs. Compare In re Faden, 96 F.3d 792, 797 (5th Cir. 1996). Consequently, the first factor supports discharge and the court must look to the other elements.

The second factor addresses the disruption to the administration of the case. This is a no asset case. ACC has presented no evidence of an administrative disruption. Therefore, the second factor favors discharge.

The third factor addresses whether the creditor would suffer prejudice by the discharge. If the creditor's right to receive his share of dividends and obtain dischargeability determinations were in some way compromised, then he would be prejudiced. In re Stone, 10 F.3d 285, 291 (5th Cir. 1994). Because this is a no-asset case, the creditor would not have received any dividends and the creditor did not miss an opportunity to file a proof of claim. Additionally, ACC has had an opportunity to brief and argue their dischargeability claim before this court. Therefore, the creditor's right to have his dischargeability claim decided

has remained uncompromised and the plaintiffs have not been prejudiced. In re Madaj, 149 F.3d 467 (6th Cir. 1998). Consequently, the third factor favors discharge.

ACC asserts that it may have had a basis to object to the discharge of the debt under either §523(a)(4) or (a)(6); but the absence of timely notice precluded an opportunity to file a complaint. ACC argues that Rodriguez failed to schedule the assets purchased from ACC and pledged as security for the note. ACC suggests that the failure amounts to a fraud or defalcation while acting in a fiduciary capacity or embezzlement or larceny under §523(a)(4) or a willful and malicious injury under §523(a)(6).

However, ACC has presented no evidence to support its allegations that Rodriguez acted in a fiduciary capacity or that he embezzled or engaged in any act of larceny. Rodriguez did not schedule the ACC collateral. But, he abandoned that collateral over a year before he filed his bankruptcy petition. He provided written notice to Liechty on April 1, 1997, that he would vacate the leased premises on May 1, 1997. Rodriguez left the pledged equipment, furniture and fixtures on the premises. Rodriguez did not file his bankruptcy petition until August 27, 1998. Liechty made no effort to inquire of or pursue the collateral from April 1, 1997, until the date of Rodriguez's petition. Therefore, ACC

would be hard pressed to allege a claim for conversion and willful and malicious injury by not scheduling the collateral. See In re Meece, 261 B.R. 403, 406-07 (Bankr. N.D. Tex. 2001) (providing definitions of willful and malicious injury). Furthermore, the evidence at trial suggests a range of value for the collateral of $7,000 to $18,000. ACC wants, however, the balance due on the note, not the value of the collateral.

ACC did not have a basis to file a complaint under either §523(a)(4) or (a)(6) had it received timely notice of the case.

In summary, the court finds: (1) that ACC's failure to receive notice was due to negligence; (2) that there would be no impact on the administration of the case; and (3) that because Rodriguez's bankruptcy was a no-asset case, even if this debt had been timely scheduled, and a proof of claim had been filed, ACC still would not have recovered from the estate; therefore, ACC would not suffer prejudice. Consequently, since the elements of the Robinson test have been satisfied, Rodriguez's debt of $184,645 is discharged.

In the event an appellant court held that the debt is not discharged, then it is due to the Ferrer firm's failure to serve notice after the amendment of the mailing matrix and the filing of the debtor's schedules. Therefore, Rodriguez would be entitled to indemnification and the Ferrer firm would be liable

to the debtor for damages sufficient to compensate Rodriguez for the amount of debt that is not discharged due to the firm's negligence, as well as his attorney's fees and costs incurred.

Based on the foregoing,

IT IS ORDERED that the Jeff J. Rodriguez shall have a judgment declaring his debt to American Chiropractic Clinic-North Dallas, P.C., discharged.

IT IS FURTHER ORDERED that the third party complaint is **DISMISSED.**

Counsel for Rodriguez shall submit a proposed final judgment consistent with this order.

Signed this _____ day of March, 2002.

Steven A. Felsenthal
United States Bankruptcy Judge